Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1998

ROSE ANNE YOUNG,
Petitioner,

v.

TOGO D. WEST, JR.,
Secretary of the Army,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented in this Title VII retaliatory discharge action, brought by Rose Anne Young against her former employer, the Department of the Army, are stated as follows:

1. Whether the Fourth Circuit's unguided, summary judgment "review of both parties evidence" (Appendix A at 14), deprived Young of notice and opportunity to respond, and grossly overstepped Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274, (1986) (interpreting Adickes v. S.H. Kress & Co. 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)), which held that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact," so as to call for an exercise of this Court's supervisory powers, where the Fourth Circuit affirmed summary judgment based on findings which were never advocated by the Army, which were not relied upon by the district court, which were demonstrably contrary to and unsupported by the evidence, and which included completely contradictory findings that Young had, on the one hand, (i)

"adduced evidence that she was an employee of the Army on August 26, 199[3], when she engaged in her protected activity and ... was terminated later that day ..." (Appendix A at 16), but, on the other hand, that summary judgment for the Army was nonetheless appropriate because Young (ii) "failed to forecast proof that would show she was an Army employee at the time she was allegedly fired [on August 26]" (Appendix A at 2).

2. Whether the Fourth Circuit's holding in this case, granting summary judgment against Young based on its own, unguided, "review of both parties evidence" (Appendix A at 14), without regard for the arguments put forward by the Army, is correct, or whether the Eleventh Circuit's holding in Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (1991), that, even after Celotex, "the *Adickes* rule remains the general rule," and that "The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact...," and that "Only when that burden has been met does the burden shift to the non-moving party...," is the correct statement of the law under Fed.R.Civ.P. 56.

LIST OF ALL PARTIES

All parties to this case are listed in the caption and have no parent companies nor subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Rose Anne Young respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which denied her petition for rehearing on July 13, 1998.

OPINIONS AND RULING BELOW

The Fourth Circuit's per curiam, unpublished opinion, affirming the judgment of the district court, is reproduced herein as Appendix A. The Fourth Circuit's denial of Rose Anne Young's petition for rehearing is reproduced herein as Appendix D. The U.S. District Court entered an Order and a Memorandum Opinion, on the same date, granting the Department of the Army's motion for summary judgment, and they are both reproduced herein, respectively, as Appendices B and C.

STATEMENT OF JURISDICTION

The order of the Fourth Circuit Court of Appeals denying Rose Anne Young's petition for rehearing was filed on July 13, 1998. This Court's jurisdiction is invoked within ninety days of that order pursuant to 28 U.S.C. § 1254 and in accordance with Rule 13.3 of the rules of the Supreme Court of the United States.

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 56(c), which provides, in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Rose Anne Young initiated contact with an EEO Counselor on August 26, 1993, concerning her claim that her supervisor, Colonel (now Brigadier General) Robert L. Nabors, had fired her earlier that day, by way of an administrative manipulation which made it appear as though she had resigned effective August 17, 1993.[1] Nabors' actions on August 26, 1993, were immediately preceded by Young's statement to him in his office that she was going to file an EEO complaint against him. Appendix A at 15.

Young timely filed a formal discrimination complaint with the Army and ultimately exhausted her administrative remedies, over three years later, before the Merit Systems Protection Board ("MSPB"). The MSPB found in its written decision that, while Young had not resigned on August 17, 1993, as Nabors had made it appear, she had nonetheless orally resigned on August 24, 1993, and so could not have been discharged on August 26, 1993. Young timely filed her

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[1]Nabors facilitated his promotion by concealing his conduct of this matter, which persuaded the Army to unlawfully withhold information about this case from the Senate Armed Services Committee. The Army subsequently explained to Senator John Warner, in a February 2, 1995, letter, that "Although well-intentioned, this decision [to withhold information] was wrong." Apdx. E at 42.

complaint in U.S. District Court on October 2, 1996, as conceded by the Army.

The Army filed its motion for summary judgment on May 15, 1997, together with a certified copy of the record of the Merit Systems Protection Board, contained in four volumes. The Army urged the court to review Young's retaliatory discharge claim under the "arbitrary and capricious" standard set forth in 5 U.S.C. § 7703(c), and based on the record before the MSPB. Young argued for de novo review of her retaliatory discharge claim.

The district court heard oral argument on May 30, 1996, and filed its decision on June 5, 1997. The district court held that the MSPB's finding, that the plaintiff had orally resigned August 24, 1993, was not arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

Young timely noted her appeal on August 1, 1997. After hearing argument, the Fourth Circuit panel filed its unpublished, per curiam opinion on June 16, 1998. The Fourth Circuit found that the district court had "explicitly reviewed [Young's] retaliatory discharge claim as a 'nondiscrimination claim,'" and concluded that "This was error." Appendix A at 12. The Fourth Circuit adopted Young's argument that "Title VII retaliatory discharge claims are 'discrimination' claims under § 7703(c)," which are entitled to de novo review, based on the plain language of the statute, 42 U.S.C. § 2000e-3. Appendix A at 12-13.

Noting that the defendant Department of the Army had "misconstrue[d], ... misread[], ... and mischaracterize[d]" the applicable standards and Young's claims (Appendix A at 11), the Fourth Circuit embarked on its "own," unguided, "review of both parties' evidence." Appendix A at 14. The Fourth Circuit found that Young had "failed to forecast proof that would show she was an Army employee at the time she was allegedly fired [on August 26]," Appendix A at 2, but simultaneously held that "[Y]oung's evidence, read in the light most favorable to her, was sufficient to show she was still an Army employee on August 26." Appendix A at 17. That these findings directly contradict each other demonstrates not only a genuine issue for trial, but also demonstrates such an abuse of the summary judgment procedure, or such a gross error, as to justify an exercise of this Court's supervisory powers.

II. STATEMENT OF FACTS

On August 3, 1993, Young offered her resignation to the defendant, to be effective at the end of the day on August 17, 1993. Appendix A at 3. The Army did not accept the tendered resignation; instead, Young's second-line supervisor, Robert L. Nabors, concurred in a plan to offer the plaintiff leave to forestall her resignation. See Appendix E at 35-36 (Edleman deposition); see also Appendix E at 38 (Nabors deposition); cf. Appendix A at 3 ("Edelman had not

mentioned the leave idea to Nabors beforehand").

Nabors had another high-level manager, Richard Edelman, suggest to the plaintiff that she go on leave until August 30, 1993, instead of resigning effective August 17. Appendix E at 35-36 (Edelman deposition).[2]

In the words of the panel, "Edelman convinced [Young] to revoke her resingation and go on leave before the resignation became effective." Appendix A at 16. As the panel noted, "the Army's own record keeper admitted that the Army credited Young (at least initially) for 24 hours of annual leave after August 17...." Appendix A at 16.

On August 26, 1993, the plaintiff went to Nabors' office at the Pentagon, interrupting her leave, and told Nabors that she was going to file an EEO complaint against him. Appendix A at 15-16. The plaintiff went from Nabors' office to the Army EEO Office to complain about sexual harassment by Nabors. Appendix A at 15. While the plaintiff was in the EEO Office, Nabors called the Army's Personnel Office and requested two employees there "to activate Young's August 17 resignation *immediately* after she (Young) threatened Nabors with an EEO complaint." Appendix A at 19-20, n.3.

"Thus, Young's resignation was finalized on August 27...," i.e., the next day. Appendix A at 18 n.3.

In its unpublished, per curiam opinion, the appellate

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[2]The Army even explicitly pleaded, in its Answer to the Complaint, that "Edelman discussed with plaintiff the idea of her taking leave through August 30 to rethink her resignation."

panel noted that Nabors' explanation of the events surrounding Young's discharge "seems odd," and agreed that "Young produced evidence from which a jury could infer that Nabors attempted to cover up the fact that he agreed to place her on leave after August 17." Appendix A at 18. The panel rejected the Merit Systems Protection Board's conclusion, affirmed by the district court, that Young had orally resigned on August 24. Appendix A at 17.

Nonetheless, the panel concluded "that the Army offered a legitimate, non-discrimnatory reason for Young's termination," without citation to any of the Army's briefs or evidence, and concluded that "Young has offered no evidence to rebut this claim by the Army...." Appendix A at 19-20. The non-discriminatory reason for Young's discharge, which the panel found was unrebutted, was "that Young would have been terminated *anyway* because she did not rescind her August 3 (written) resignation request before it became effective on August 17. [footnote omitted]" Appendix A at 19.

The panel did not explicily reconcile this finding, of a non-discriminatory reason for Young's discharge, with its earlier findings, (i) that "Young adduced evidence that she was an employee of the Army on August 26, 199[3]," Appendix A at 16; (ii) that "[a manager named] Edelman convinced her to revoke her resignation and go on leave before the resignation became effective," Appendix A at 16; (iii) that "the Army credited Young (at least initially) for 24

hours of annual leave after August 17 for the August 21 pay period," Appendix A at 16; (iv) that "a federal employee cannot take annual leave after she has resigned," Appendix A at 16; and (v) that "Young presented some evidence that she was still an Army employee after August 17 because she agreed to revoke her resignation and go on leave." Appendix A at 16.

The panel implicily found, in a footnote, that Young could not fully "revoke" or "rescind" her resignation without personally "contact[ing] the CPO [Civilian Personnel Office] to cancel her resignation." Appendix A at 19 n. 2. This finding was also unsupported by any citation to the record, and subordinated the intentional actions of supervisory personnel to the administrative processing of paperwork in determining employment status. The panel had generally credited testimony by "Young's expert on civil service employment practices," Appendix A at 4, but ignored his testimony that he "wasn't aware that there [] would be any reason for [Young] to contact the [] Civilian Personnel Office about [] the [post-August 17] leave." Appendix E at 45-46.

The panel apparently recognized that it had to reconcile the Army's decision to "correct" Young's leave status after August 17, rather than to "correct" Young's employment status after August 17, with its unsupported finding that the decision to do the former was made "without any further discretionary action...." Appendix A at 20 n. 3. The panel did so by simply asserting that it could "see no

significance in the fact that Young's timecard was corrected after she was terminated." Appendix A at 20.

The panel speculated, in contradiction to specific evidence, that "Most likely, after Young's August 3 resignation finally found its way through the Army bureaucracy, someone realized that Young should not have been on annual leave after the resignation's August 17 effective date and credited the leave back to her." Appendix A at 20. The panel thereby ignored testimony that the copies of the "corrected" timecards, which were falsified by Young's supervisors[3] in order to credit annual leave back to her, "were copies from somebody else. They did not come through civilian pay." Appendix E at 47-48.[4]

The panel ignored the justifications for summary judgment proferred by the Army and the district court, and invented its own justifications without affording Young any opportunity to respond. The consequent findings of the panel plainly suffered from the complete lack of adversarial testing which resulted.

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[3]The falsified timecards were signed by Young's direct supervisor, Lt. Colonel Knott. The Army never contended that the timecards were corrected by an unknown "someone," as the panel speculated, so the matter should have been resolved as conceded in Young's favor. Adickes, 398 U.S. at 160, 90 S.Ct. at 1610, 26 L.Ed.2d at 156.

[4]That testimony came from "the Army's own record keeper...." Appendix A at 16.

REASONS FOR GRANTING THE WRIT

The facts of this case present an excellent opportunity for the Supreme Court to correct a frequently applied but "erroneous interpretation of *Celotex*...," Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 n.8 (11th Cir. 1991), and to elucidate a proper standard for measured application of Fed.R.Civ.P. 56, without trampling the nonmoving party's right to a jury trial.

In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1986), this Court explained its prior holding in Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d at 142, that "'[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*'" Adickes, 398 U.S. at 160, 90 S.Ct. at 1610, 26 L.Ed.2d at 155, quoting Advisory Committee Note on 1963 Amendment to subdivision (e) of Fed.R.Civ.P. 56.

In Celotex, this Court explained that the burden on the moving party is met by simply "'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325, 106 S.Ct. at 2554, 26 L.Ed.2d at 275. This Court did not, however, mean to say that a moving party may obtain summary judgment by the mere incantation of Rule 56, without an analysis to put the nonmoving party on notice of

the issues to be dealt with. Rather, this Court noted that "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demontrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323, 106 S.Ct. at 2553, 91 L.Ed.2d at 274.

The Celotex Court "fully agree[d] with the *Adickes* Court that the 1963 Amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c)." Celotex, 477 U.S. at 325, 106 S.Ct. at 2554, 26 L.Ed.2d at 275.

In this case, however, the Fourth Circuit permitted the Army to win summary judgment based on arguments never advanced by the Army, and to which Young was never given any opportunity to respond. Finding that the Army had "misconstrue[d], ... misread[], ... and mischaracterize[d]" the applicable standards and Young's claims (Appendix A at 10), and that the district court's rationale for summary judgment was in error, the Fourth Circuit nevertheless embarked on its "own," unguided, "review of both parties' evidence" (Appendix A at 13), which deprived Young of a fair opportunity to respond.

Given a fair opportunity, Young would have pointed out, as she has done in her Statement of the Case herein, that

the Fourth Circuit was making findings without record support, and which were, in fact, directly contradicted by the record. Young was not given a fair opportunity to make these arguments, however. Instead, the Fourth Circuit engaged in an independent "review of both parties' evidence," which amounted to a *sua sponte* dismissal, on the merits, in violation of the Due Process Clause of the Fifth Amendment, which forbids *sua sponte* dismissal except "when the party who brought the case has been given notice and an opportunity to respond." Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico, 695 F.2d 524, 526 (11th Cir. 1983).

Having persuaded the appellate panel that the Army had "misconstrue[d], ... misread[], ... and mischaracterize[d]" the applicable standards and Young's claims (Appendix A at 10), and that the district court had erred, Young rebutted everything that she had been given a fair opportunity to rebut. It was completely unfair and a gross abuse of the summary judgment procedure for the appellate panel to thereupon substitute its own reasoning for that of both the moving party and the district court, without affording Young any opportunity to respond, at least in the context of these facts.

Most properly, the Army's failure to argue or present evidence in support of the Fourth Circuit's rationale conceded those matters in Young's favor for summary judgment purposes. Adickes, 398 U.S. at 160, 90 S.Ct. at 1610, 26 L.Ed.2d at 156.

> [T]he party moving for summary

> judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required. 6 J. Moore, Federal Practice ¶ 56.22[2], pp. 2824-2825 (2d ed. 1966).

Adickes, 398 U.S. at 161, 90 S.Ct. at 1610, 26 L.Ed.2d at 156. The Fourth Circuit's sledgehammer approach to summary judgment is completely unfair, and is entirely at odds with the approach in other circuits, that "the *Adickes* rule remains the general rule" after Celotex. Clark, 929 F.2d at 608.

CONCLUSION

The Petition for Writ of Certiorari should be granted so the Court may clarify that Rule 56 does not permit courts to sit as juries, in judgment of the merits of the claims before them. Summary judgment should be reversed and the case remanded for trial.

Respectfully submitted,

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by and through her counsel

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Opinion

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2066

Rose Anne Young,	)	
	)	
Plaintiff-Appellant,	)	Appeal from the
	)	United States
v.	)	District Court for
	)	the Eastern District
Togo D. West, Jr.,	)	of Virginia
Secretary of the Army,	)	
Department of the Army,	)	(UNPUBLISHED)
	)	
Defendant-Appellee.	)	

Argued: January 26, 1998
Filed: June 16, 1998

BEFORE Wilkinson, Hamilton and Michael, Circuit Judges.

PER CURIAM.

Rose Anne Young appeals from the district court's grant of summary judgment in favor of her former employer,

the United States Army, on (among other things) her claim that she was fired in retaliation for filing a Title VII complaint. The court rejected Young's Title VII retaliatory discharge claim on the ground that Young was not an employee of the Army at the time she said she was fired. The court reached this conclusion because an administrative law judge (who reviewed Young's claim that she was constructively discharged from the civil service) found that Young had resigned her position with the Army two days prior to her alleged firing. The district court held that it was bound by this administrative finding. Young argues that it was improper for the court to defer to this finding when evaluating her Title VII retaliatory discharge claim and, therefore, the court was wrong to hold that she was not an Army employee on the date she claims she was fired. We agree that the court should not have deferred to the prior administrative finding because Young was entitled to de novo consideration of all issues of fact underlying her Title VII retaliatory discharge claim. However, we conclude that Young still failed to forecast proof that would show she was an Army employee at the time she was allegedly fired. A careful review of the record reveals that Young did not dispute that she failed to take the proper steps to revoke her prior resignation. Accordingly, we affirm the district court's grant of summary judgment for the Army on Young's Title VII claim.

I.

Young, a civil servant, worked at the Pentagon as an administrative assistant. On August 3, 1993, Young submitted her written resignation, to be effective August 17, on a "request for personnel action" form. After hearing of this, Young's supervisor, Colonel (now Brigadier General) Robert L. Nabors tried unsuccessfully to dissuade her from resigning. On August 17, Richard Edelman, a high level civilian Army employee, received Nabors' permission to speak with Young about delaying her decision to resign. Edelman convinced Young to take two weeks off before deciding whether to leave the Army. Although Edelman had not mentioned the leave idea to Nabors beforehand, Nabors agreed (when talking with Edelman the next day) to allow Young to go on leave from August 17 to August 30 to think about her decision.

A federal employee may rescind her resignation at any time before the end of the day that it goes into effect. According to Edelman, he told Young during their August 17 conversation that if she wanted to go on leave she would have to contact the civilian personnel office (CPO) in order to withdraw her resignation and request annual leave. In fact, Edelman testified, he informed Young that *only* she would contact the CPO to rescind her resignation and go on leave. In her deposition Young said the Edelman never told her she had to withdraw her own resignation or put in for annual leave; Edelman, she said told her that he would take care of it. However, Young offered no evidence to show that

Edelman could have withdrawn her resignation for her or that (even if Edelman could have rescinded her resignation) he did not do so for discriminatory reasons. Young never contacted the CPO to withdraw her resignation or to request leave on or after August 17.

However, when Young did not return to work after August 17 (a Tuesday), the Army processed a timecard for Young with 24 hours (3 days) of annual leave for that week. Federal employees cannot take leave after they resign, so Young's August 3 written resignation request either did not take effect on the stated date, August 17, or the CPO made a mistake when it paid Young for those 24 hours of leave. After Young was terminated, the Army processed a corrected timecard that retroactively credited 24 hours of leave back to Young.

On August 24 Young called Nabors and the deputy director of her department and informed them that she was "not coming back." Concluding that Young had resigned, Nabors took steps to have another civilian employee, Denise Richards, fill Young's position with his department. CPO employee Mary Laverty testified in deposition that the Army accepts oral resignations, although it generally encourages an employee to confirm resignation "with something in writing." Young's expert on civil service employment practices confirmed by affidavit that resignations may be oral, although he said that they are most often followed up with paperwork.

Young admitted in her deposition that she called

Nabors on August 24 and told him that she intended to resign. However, she testified that she intended for her resignation to be effective August 30, when she was due back from leave. Young's expert backed her up on this. In his affidavit he said that it was reasonable to conclude from Young's statement on August 24 that she meant she was "not coming back" *after* her leave ended on August 30. Thus, he opined, Young could have rescinded her oral resignation before its August 30 effective date.

In her deposition Young testified that she received a phone call from Nabors regarding work-related matters on August 25. Young said it was her impression from this conversation that she was still an employee of the Army because Nabors treated her like an employee throughout the phone call.

On the morning of August 26, Young appeared in Nabors' office and told him that she wanted "that bimbo [Richards] ... out of here" because she (Young) was returning to work. Nabors informed Young that she had resigned her position twice, on August 17 and August 24, and that as far as he knew she was not an employee of the Army anymore. Young then threatened to file an Equal Employment Opportunity (EEO) complaint against Nabors, although it was not entirely clear to him that she actually intended to do so until he heard from the Army's EEO office later that afternoon. After this meeting, Young went directly to the Army's EEO office to see about filing a complaint against

Nabors for harassment based on her sex, race, or national origin.

Immediately after Young left his office, Nabors called CPO personnel to inform them of the verbal resignation and to ask if Young was still an Army employee. The two CPO employees with whom Nabors spoke, Laverty and Katie Covington, told Nabors that Young's verbal resignation was effective and that he did not have to allow her to rescind it. They also told him that Young's August 3 (written) resignation was binding as well. According to Nabors, his calls to Covington and Laverty were requests for advice on Young's employment status, not attempts to take adverse personnel action against Young. However, Nabors did not inform either Covington or Laverty that he had agreed to allow Young to go on leave effective August 17. Nabors also admitted that in his conversations with Covington and Laverty he "asked that [Young's] resignation of 17 August 1993 be activated." Later that day (August 26) Nabors called Young into his office and told her that he had checked with the CPO and found that she was no longer an Army employee.

Meanwhile, at the time Nabors spoke with Covington and Laverty on August 26, Young's written resignation request dated August 3 (which she never asked the CPO to revoke) was still being processed by the CPO. In fact, that resignation had *already* been approved by the CPO's personnel division and had been sent to the CPO's technical

services division for entry into the Army database, the last step necessary for it to become final. There was no evidence that the CPO took any action to activate this resignation on or after August 26 other than entering it into the Army database. Young's August 3 written resignation, effective August 17, was finalized on August 27. Further, according to Laverty, the CPO usually finalizes an employee's resignation well after its effective date because "it takes time for that piece of paper to make its way through the entire personnel office."

Young filed an EEO complaint alleging that due to her sex, race, or national origin, she had been subjected to harassment and had been denied an opportunity to revoke her resignation. The EEOC administrative law judge (ALJ) viewed Young's complaint as a "mixed case" complaint because it alleged that Young had been involuntarily terminated from the civil service, a claim that fell under the jurisdiction of the Merit Systems Protection Board (MSPB). Thus, the ALJ at the EEOC severed this involuntary termination claim from her harassment claim and remanded the termination claim to the MSPB.

At an evidentiary hearing before an MSPB ALJ, Young testified that she had not resigned on August 24. The ALJ did not credit Young's testimony and decided that her oral resignation was effective on that date. The MSPB ALJ determined that since Young had resigned two days before she asked to rescind her resignation on August 26, the Army was not obliged to allow Young to withdraw her resignation.

Therefore, the ALJ decided, Young had failed to prove that her resignation was involuntary. The MSPB appeals board denied Young's petition for review.

In the proceedings before the EEOC, Nabors was in charge of the Army's responses to all document production requests. Nabors certified that no existing documents showed that the Army approved leave for Young after August 17. Yet the CPO record keeper admitted in her deposition that the Army had processed a timecard for Young for the pay period ending August 21 with 24 hours of leave on it. Later, the Army processed a "corrected" timecard that retroactively credited these 24 hours of leave back to Young.

Nabors told the MSPB that he did not get involved with employee timecards. But Nabors later admitted in his deposition that he sometimes signed civilian employees' timecards when their direct supervisors were unavailable. Further, Richards (Young's replacement) testified that she had Nabors sign both her timecard and Young's timecard on August 19. In discovery the Army produced Richards' timecard. However, the Army reported that Young's timecard was missing from storage (its retention period had not yet expired). The Army never produced this timecard.

Young sued the Army, alleging that: she had been harassed by Nabors based on her sex, race, or national origin; she had been constructively discharged because of her sex, race, or national origin; and she had been discharged in retaliation for engaging in activity protected by Title VII.

Young brought all of these claims under Title VII and did not appeal the MSPB decision.

The district court granted summary judgment to the Army on all three of Young's Title VII claims. The court held that even though Young had not appealed the MSPB decision, hers was a "mixed case" that presented both MSPB claims and Title VII discrimination claims. Holding that it was required to review "the discrimination claims de novo and the other claims on the basis of the MSPB record," the court proceeded to review Young's Title VII harassment claim de novo and her Title VII retaliatory discharge and constructive discharge claims based on the administrative record. Specifically, as to the retaliatory discharge claim, the court declined to "review [that claim] de novo because of the prior finding made by the [MSPB]" that Young resigned her position with the Army on August 24, 1993. If the findings stood, the court reasoned, then Young could not prove that she was discharged in retaliation for her EEO complaint because she was not an employee on August 26, 1993. After reviewing the record, the court concluded that the ALJ's finding was not arbitrary or capricious, was made in accord with procedures required by law, and was supported by substantial evidence. Therefore, the district court held that Young could not make out a prima facie case of retaliatory discharge.

II.

A.

On appeal Young claims that the district court was wrong to grant the Army's motion for summary judgment on her Title VII retaliatory discharge claim.[1] Young argues that the court improperly applied the deferential standard of review reserved for MSPB appeals instead of the de novo review it must afford all Title VII claims of discrimination. The Army contends, however, that the court correctly applied de novo review to Young's "discrimination claims" and deferential review to her "nondiscrimination claims." It just so happens, the Army argues, that the same factual issue that was determinative of Young's "nondiscrimination claim" that she was not involuntarily terminated on August 24 was also dispositive of her "discrimination claim" that she was discharged in retaliation for engaging in protected activity on August 26. And, because there was no reason for the court to disturb the MSPB ALJ's finding that Young voluntarily resigned from the civil service on August 24, that fact controlled the district court's de novo review of her retaliatory discharge claim. Here, the Army's position is that the

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[1]Young also appeals the district court's grant of summary judgment on her harassment claim (to which the court applied the proper, de novo standard of review) and two of the court's evidentiary rulings. We have considered Young's argument on the harassment claim and find it to be without merit. Further, the court's evidentiary rulings were not an abuse of its discretion.

question of whether Young made a prima facie case of retaliatory discharge (including the underlying factual question whether she was an Army employee on August 26) was a "discrimination claim" and that the question of whether Young was involuntary terminated from the civil service (including the ALJ's determination that she resigned August 24) was a "nondiscrimination claim." This position misconstrues the plain language of the statute governing review of mixed cases, misreads the district court's opinion, and mischaracterizes Young's claim.

A district court has jurisdiction to review "mixed case," which involve both Title VII discrimination claims and civil service claims appealed from the MSPB, under 5 U.S.C. § 7703. *See Johnson v. Burnley,* 887 F.2d 471, 474 n.1 (4th Cir. 1989), *vacated and appeal dismissed; Rana v. United States,* 812 F.2d 887, 888 n.1 (4th Cir. 1987). In such cases, the court review the Title VII claims and the claims appealed from the MSPB separately. With regard to the MSPB claims, the court must "review the record" and set aside any agency findings or conclusions that are "arbitrary or capricious," "obtained without procedures required by law," or "unsupported by substantial evidence." 5 U.S.C. § 7703(c)(1)-(3). However, with regard to claims of "*discrimination brought under [Title VII]* the employee applicant shall have the right to have *the facts subject to trial de novo.*" 5 U.S.C. § 7703(c) (emphasis added). Thus, quite contrary to the Army's construction of § 7703(c), if Young's case presented

both Title VII discrimination claims and an appeal from an MSPB decision, it would not have been proper for the district court to allow an MSPB ALJ's factual finding to control the court's de novo review of the Title VII discrimination claims. Rather, the court would be required to review de novo all the facts underlying the Title VII discrimination claims when evaluating those claims, and then review the findings of the MSPB ALJ deferentially when evaluating any claims appealed from the MSPB. As a result, it would be possible for the court to determine that Young created a genuine issued of fact that she was an Army employee on August 26 for the purpose of her Title VII retaliatory discharge claim and at the same time uphold the MSPB ALJ's finding that Young voluntarily resigned from the Army on August 24 for the purpose of the involuntary termination claim (if she had appealed that claim from the MSPB).

The Army also misread the district court's opinion, which did not even purport to engage in de novo review of Young's retaliatory discharge claim. The court held that Young's case was a mixed case and explicitly reviewed her retaliatory discharge claims as a "nondiscrimination claim." This was error. Title VII retaliatory discharge claims *are* "discrimination" claims under § 7703(c). *See* 42 U.S.C. § 2000e-3 (Title VII provision prohibiting what we term "retaliatory discharge" actually prohibits "discriminat[ion]" against employees for protected activity); *see, e.g., Holifield v. Reno,* 115 F.3d 1555, 1566-1567 (11th Cir. 1997) (per

curiam adopting district court opinion) (reviewing retaliatory discharge claim de novo under § 7703(c)); *Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993) (same). Indeed, all Title VII claims are "discrimination" claims. Therefore, even if Young's complaint had presented a mixed case, the court applied the wrong standard of review to her retaliatory discharge claim.

However, the district court was wrong to characterize Young's case as a mixed case in the first place. Young did not appeal the MSPB decision that she had voluntarily resigned on August 24. She simply brought a Title VII claim in federal court, alleging (among other things) that she was discharged in retaliation for engaging in activities protected by Title VII. A federal employee is not required to appeal a prior MSPB decision or have adverse MSPB factfindings set aside in order to bring a Title VII claim in federal court. Such a requirement would place a federal employee who goes to the MSPB in a worse position that a private employee who goes to the EEOC. This would be contrary to § 7703(c), which by providing a trial de novo on Title VII claims in mixed cases, requires that civil servants be treated exactly like other Title VII plaintiffs. *Cf. Johnson*, 887 F.2d at 477. MSPB factfinding is accorded no weight when a district court evaluates a federal employee's right to have her Title VII claims decided in federal court.

Therefore, despite the Army's attempt to focus on the MSPB decision, review of that decision simply was not an

issue in this case. We hold that the district court erred by reviewing the MSPB ALJ's decision under 5 U.S.C. § 7703(c)(1)-(3) when considering whether Young's Title VII claim for retaliatory discharge could survive summary judgment. Specifically, the court should not have deferred to the MSPB's finding that Young resigned on August 24, 1993, when it (the court) evaluated Young's evidence that she was discharged on August 26 in violation of Title VII. In determining whether Young was an employee of the Army on August 26, the court should have considered her evidence under the same standard for summary judgment used in any Title VII case.

B.

We may still affirm the district court's grant of summary judgment on Young's Title VII retaliatory discharge claim if it was proper under the correct standard of review. Summary judgment is a purely legal question that we may decide by conducting our own review of both parties' evidence.

Summary judgment is proper when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(e). In order to avoid summary judgment on a retaliatory discharge claim, an employee must first establish a prima facie case of retaliation. To do so she must first offer evidence from which a reasonable jury could find that (1) she engaged in protected activity, (2) after which she was fired, and (3) there was a

causal link between her protected activity and her termination. *See Hopkins v. Baltimore Gas & Elect. Co.*, 77 F.3d 745, 754 (4th Cir.), *cert. denied*, 117 S.Ct. 70 (1996); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991). Once the employee makes out a prima facie case of retaliation, the burden of persuasion then shifts to her former employer, who must offer evidence of a legitimate, non-discriminatory reason for her termination. *See Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). When the employer produces such a reason, the burden shifts back to the employee, who must produce evidence that the employer's proffered reason for her termination was merely pretext for intentional discrimination. *See id.* If the plaintiff presents evidence to create a material issue of fact on each element of the prima facie case on the issue of pretext and discrimination, then summary judgment is appropriate.

We conclude that Young presented ample evidence from which a reasonable jury could find that she established a prima facie case of discrimination. To establish prong one (protected activity) she offered evidence that she told Nabors on the morning of August 26, 1993, that she would file an EEO complaint against him. Although Nabors claimed that he did not know that Young would act on her threat, he admitted that she "threatened [him] with an EEO complaint" that morning. Further, the Army does not contest that Young visited its EEO office to see about filing a complaint immediately after leaving Nabors's office. From this, a jury

could find that Young told Nabors she planned to file an EEO complaint against him, which is protected activity, *see, e.g., Carter v. Ball,* 33 F.3d 450, 460 (4th Cir. 1994).

With regard to prong two (termination after protected activity), Young adduced evidence that she was an employee of the Army on August 26, 1997, when she engaged in her protected activity and that she was terminated later that day (effective August 27). The Army does not contest that although Young initially planned to resign on August 17, Edelman convinced her to revoke her resignation and go on leave before the resignation became effective. Also, the Army's own record keeper admitted that the Army credited Young (at least initially) for 24 hours of annual leave after August 17 for the August 21 pay period (possibly corresponding to Wednesday through Friday, August 18 to 20). Further, Young's expert testified that a federal employee cannot take annual leave after she has resigned. Thus, Young presented some evidence that she was still an Army employee after August 17 because she agreed to revoke her resignation and go on leave.

The Army contends, however, Young was not an Army employee on August 26 because she resigned on August 24. We agree that there was substantial evidence to support that contention. But we do not sit as a jury. If Young offered sufficient evidence from which a reasonable jury could find that she did not resign on August 24, she met the second prong of her prima facie case. We conclude that

Young's evidence, read in the light most favorable to her, was sufficient to show she was still an Army employee on August 26.

First, Young's evidence suggested that when she told Nabors on August 24 that she was "not coming back" she meant she planned to resign effective August 30. Young testified that she did not intend to resign on August 24. Her expert confirmed this view when he opined that it was only reasonable to conclude that Young intended to resign effective August 30, after her leave expired. Further, the expert testified that in order for an oral resignation to be effective it usually must be followed up with written documentation. Although the Army sometimes accepted oral resignations, it had no documentation to confirm that Young had orally resigned on August 24.

Second, Young produced evidence that Nabors considered her an Army employee on August 25, the day after he said she resigned. Nabors telephoned Young on August 25 to speak about work-related business. During the call he treated her like an employee and did not indicate to her that he thought she had resigned.

Third, Young's evidence suggested that Nabors believed that her purported August 24 resignation was not valid. Nabors admitted that during his August 26 conversations with Laverty and Covington he "asked that [Young's] resignation dated 17 August 1993 be activated." If Young had effected a valid oral resignation on August 24, for

which no documentation was necessary, there was no need to activate her earlier, written resignation. Moreover, it seems odd that Nabors called Laverty and Covington to inform them of Young's oral resignation on August 26, immediately after Young met with him about returning to her job, rather than on August 24, when the resignation supposedly occurred.

Fourth, Young produced evidence from which a jury could infer that Nabors attempted to cover up the fact that he agreed to place her on leave after August 17. Nabors was in charge of the Army's document production efforts before the EEOC, and he certified that no documents showed that Young was on leave after August 17. Yet, Young received 24 hours of annual leave and the Army's own record keeper admitted that there must be documentation for that. Nabors also denied that he got involved with timecards, but Young's replacement, Richards, said that Nabors had signed Young's timecard for the week of August 21. Further, when Nabors called Covington and Laverty on August 26 to ask whether Young was still an Army employee, he did not inform them that he had placed Young on leave after August 17.

Taken together, this evidence could lead a reasonable jury to conclude that Young did not orally resign on August 24. Therefore, she met the second prong of her prima facie case.

Finally, Young also offered evidence to meet the third prong of her prima facie case (causal link between termination and protected activity). On August 26 Nabors

asked Covington and Laverty to activate Young's August 17 resignation *immediately* after she (Young) threatened Nabors with an EEO complaint. Here, the temporal proximity of Young's threat and her termination by Nabors could, by itself, allow a reasonable jury to find that Young's termination was causally linked to her protected activity.

However, we also conclude that the Army offered a legitimate, non-discriminatory reason for Young's termination. Even if Young's evidence tended to prove that Nabors fired her on August 26 in retaliation for threatening him with EEO complaint, the Army claims that Young would have been terminated *anyway* because she did not rescind her August 3 (written) resignation request before it became effective on August 17.[2] As a result of Young's failure to withdraw her August 3 resignation request, her resignation was processed by the Army as if she had never been placed on leave. It was simply too late for Young to rescind the resignation on August 26; the resignation had gone into effect on August 17 and all that remained was mere processing.[3]

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[2]This is true regardless of whether Edelman told Young on August 17 that she had to contact the CPO to cancel her resignation. Young offers no evidence to suggest that Edelman was responsible for informing the CPO about putting her on leave.

[3]By August 26 the CPO had signed off on Young's resignation and it was ready to be entered into the Army's database. The only act the Army performed to effectuate her written resignation on or after August 26 was the perfunctory task of entering it into the

Therefore, the Army has produced sufficient evidence to convince a reasonable jury that Young would have been terminated *regardless* of whether Nabors called the CPO and directed that her written resignation be reactivated, because Young never requested that the resignation be deactivated before its August 17 effective date.

Young has offered no evidence to rebut this claim by the Army or to show that it was a pretext for discrimination. Even if her evidence suggested a cover-up on Nabors's part, this evidence is of no help to her. No matter what Nabors did -- event if he did try to fire her on August 26 -- it did not matter because she had already resigned on August 17. Further, we see no significance in the fact that Young's timecard was corrected after she was terminated. We attribute no sinister reason to this, and Young suggests none. Most likely, after Young's August 3 resignation finally found its way through the Army bureaucracy, someone realized that Young should not have been on annual leave after the resignation's August 17 effective date and credited the leave back to her.

Because we conclude that Young did not present evidence that the Army's proffered legitimate reason for her termination was mere pretest for retaliation, we find that summary judgment for the Army on Young's retaliatory

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database. Thus, Young's resignation was finalized on August 27 without any further discretionary action from Nabors or the CPO on or after August 26.

discharge claim was proper. Therefore, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

Order

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Rose Anne Young,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-1405-A
	)	
Togo D. West, Jr.,	)	
Secretary of the Army,	)	
Department of the Army,	)	
	)	
Defendant.	)	

ORDER

For the reasons stated in the attached Memorandum Opinion, it is hereby ORDERED that:

(1) Defendant's Motion for Summary Judgment is GRANTED;

(2) the Clerk of the Court shall forthwith send copies of this Order and the Memorandum Opinion to all counsel of record;

and (3) THIS CAUSE IS FINAL.

/s/ James C. Cacheris
United States District Judge

Alexandria, VA
June 5, 1997

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

Memorandum Opinion

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Rose Anne Young,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-1405-A
	)	
Togo D. West, Jr.,	)	
Secretary of the Army,	)	
Department of the Army,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Togo West, Secretary of the Army's ("Army") Motion for Summary Judgment. Plaintiff Rose Anne Young's ("Young") Complaint alleged Racial and Sexual Harassment (Count I), Retaliatory Discharge (Count II), and Constructive Discharge (Count III). Young has also moved for Partial Summary Judgment on Count II, Retaliatory Discharge. Trial is set for June 16, 1997.

I.

The parties agree that Young, a white female civilian employee, tendered her resignation on August 3, 1993, effective August 17, 1993. The parties disagree as to the subsequent events. Young, a white female, alleges that her supervisor, then-Colonel Robert Nabors ("Nabors"), a black male, subjected her to sexual and racial harassment. She further alleges that she was discharged because of her threat to file an EEO Complaint, or, in the alternative, if she resigned, her resignation was involuntary, and came as a result of the alleged discrimination.

II.

Summary judgment is appropriate only in "'the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issued as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Baber v. Hospital Corp of Am., 977 F.2d 872, 874 (4th Cir. 1992); Fed R. Civ. P. 56(c). "A district court must grant summary judgment if, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an essential element of that party's case." Baber, 977 F.2d at 874 (citation omitted). However, a court may only grant a summary judgment motion "if the non-movant failed to make a sufficient showing on an element on which he had the ultimate burden of proof." Brock v. Entre

Computer Ctrs., Inc., 933 F.2d 1253, 1259 (4th Cir. 1991) (citation omitted).

"The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for th[at] [party]." Anderson, 477 U.S. at 252. In reviewing the evidence submitted by the parties, "the court must draw any inferences in the light most favorable to the non-movant." Brock, 933 F.2d at 1259 (citation omitted). The court must ultimately "determine whether the record taken as a whole could lead a reasonable trier of fact to find for the non-movant." Id. (citation omitted).

III.

In Count I, the Plaintiff alleges sexual and racial harassment under Title VII, which this Court reviews on a de novo basis. A Title VII claim for sexual harassment requires proof of: (1) unwelcome conduct; (2) based on the sex of the plaintiff; (3) which is sufficiently severe or pervasive to create an abusive work environment; and (4) imputable on some factual basis to the employer. Spicer v. Commonwealth of Va., Dept. of Corrections, 66 F.3d 705, 710 (4th Cir. 1995). The fourth element concerning employer liability will only be satisfied if the employer knew or should have known of the illegal conduct and failed to take prompt and sufficient action to remedy the situation. Andrade v. Mayfair Mgmt., Inc., 88 F.3d 258, 261 (4th Cir. 1996). Similarly, to establish a claim for harassment based on race, Young must establish that the

subject conduct was unwelcome and based on race, and that it was sufficiently severe or pervasive.

In her Opposition to Summary Judgment, Plaintiff devotes no specific argument to Count I. As evidence of racial and sexual harassment in the Opposition, she focuses on two separate alleged conversations, detailed in Paragraphs 20 and 21 of her list of facts not in dispute. In one, she asserts that Nabors remarked that Young resembled a 15-year old, compared her figure to that of a runway model, and asked her if she used "Topsy Tail" in her hair. In the other, he allegedly stated she had a "German temper." In addition to the two conversations, Young claims that Nabors (1) invited her to a July 4th barbeque; (2) asked if she had a high IQ; (3) ordered Knott to ask her what she would do if she were trapped under snow as part of "an IQ test"; and (4) shook a chair in which she sat. That is the totality of the allegations for both sexual and racial harassment.

Other than her own statements, though, Young has presented no evidence of sexual or racial harassment or discrimination. The Court recognizes that Nabors testified that he had never been alone with Young anytime prior to August 26. See Nabors Depo. at 14. The testimony of Roy Cook flatly contradicts him, though. See Cook Depo. at 28-30. Even taking Cook's statements as true, however, it does not provide evidence of sexual or racial harassment.

The Plaintiff, at best, provides isolated incidents which are insufficient to establish harassment. See Hopkins

v. Baltimore Gas & Elec. Co., 77 F.3d 745, 753 (4th Cir. 1996) (bumping into coworker, positioning a magnifying glass over coworker's crotch, and kissing coworker in a receiving line not sufficient to establish hostile work environment for sexual harassment); Friend v. Leidinger, 588 F.2d 61, 67 (4th Cir. 1978) (isolated incidents of racial tension not sufficient to establish race-based claim); see also Saxton v. AT&T, 10 F.3d 526, 534 (7th Cir. 1993) (two instances involving touching of knee and upper thigh and attempted kissing not sufficient). The incidents were minor, they took place over a six-month period, and they cannot be considered sexually or racially threatening or humiliating. The conduct was neither sever nor pervasive, and did not create an abusive work environment.

The Court notes that Young also complains that her supervisors "piled" work on her at the beginning of her term with the Army. There is no evidence, however, that this had anything to do with her race or her sex. The increased workload, according to Young's own testimony, came as a result of Ms. Tagmeyer's resignation. Accordingly, summary judgment is GRANTED to the Defendant on Count I.

IV.

The Army asserts that this Court should not review Counts II and III de novo because of the prior findings made by the Merit Protection Systems Board ("MPSB"). Specifically, Defendant argues that this is a mixed case governed by 5 U.S.C. § 7703(c) and the Court should give

deference to the Board's decision that Young voluntarily resigned. Young argues that she is not seeking review of the MPSB decision, but instead has filed an independent action under Title VII, and all Title VII cases should receive de novo review. Young, however, fails to cite authority which specifically addresses that contention.

The Court agrees that the plaintiff has brought an independent action in this lawsuit, and not requested a review of the MPSB's decision. See Lassiter v. Reno, 885 F. Supp. 869, 873 n.1 (E.D. Va. 1995). The Court finds that this action presents a "mixed case," such that this Court, and not only the Court of Appeals for the Federal Circuit. has jurisdiction to hear this case pursuant to 5 U.S.C. § 7703(b). See Johnson v. Burnley, 887 F.2d 471, 474 n.1 (4th Cir. 1989). Despite the Plaintiff's arguments, she has presented no authority for her contention that her entire case merits de novo review. Accordingly, the Court will review the discrimination claims de novo and the other claims on the basis on the MPSB record. See id..[1]

In Count II, Young alleges retaliatory discharge. The Army argues that Young resigned. Section 704(a) of Title VII prohibits retaliatory action by an employer against an

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[1]The Court notes that the Fourth Circuit touched on these issues in an unpublished opinion. See Archuleta v. Sullivan, 1991 WL 179071, *2-3 (4th Cir. Sept. 13, 1991) (unpublished opinion) (though plaintiff brought Title VII action, court found no support for argument that entire case should be reviewed de novo).

employee who files a claim or otherwise acts against the employer pursuant to Title VII. In order to establish a prima facie case, a Plaintiff must demonstrate (1) engaging in a statutorily protected activity; (2) an adverse personnel action taken by the employer; and (3) a causal connection between the two. Hopkins, 77 F.3d at 754. In the case at bar, the Army insists that Young resigned on August 17, or, at the latest, on August 24. The Plaintiff asserts that she was fired on August 26, because she threatened to file an EEO Complaint during a meeting with Nabors on that day at approximately 8 a.m.

Administrative Judge Bogle ("Bogle") found Young's testimony to be "not credible." Def. Ex. 7 at 6. Bogle emphasized that Young "had no reason" to call Nabors and the others, and that the testimony of the other witnesses that Young resigned during phone calls on August 24 was credible. Id. at 6-7. Though the Plaintiff now argues that no resignation occurred because no written confirmation of it existed, Bogle considered that exact argument in ruling that "[a]n employee's oral resignation is valid and an agency may separate an employee who has orally resigned without following any special provisions." Id. at 7 (citing Griessenauer v. Department of Energy, 754 F.2d 361, 364 (Fed. Cir. 1985)). Bogle held that Young's resignation was effective on August 24, and that the Army had no obligation to permit her to withdraw it when she returned to work on August 26. Id. (citing Schwartz v. U.S. Postal Service, 68

M.S.P.R. 142, 145 (1995)).

This Court can only set aside those finding if they are:

(1) arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with law;

(2) obtained without procedures required by law, rule or regulation having been followed; or

(3) unsupported by substantial evidence.

5 U.S.C. § 7703(c).

Young argues that Nabors, the alleged wrongdoer, controlled the Army's document production, and destroyed time cards. Pl.'s Opp. at 14-15. Young, however, provides extremely thin evidence in support of this contention. Young relies wholly on an allegedly missing time card which would establish that Young had been granted leave on August 17. The Court does not believe that Nabor's conflicting testimony on time cards establishes by a preponderance that the time card existed. Even if it did, it would not require setting aside Bogle's most important finding, i.e. that Young resigned on August 24.

Second, Young contends that the necessary legal procedures were not followed. Specifically, Young asserts that Bogle failed to consider the entire complaint, and only focused on whether Young resigned voluntarily. Young argues that this approach failed to abide by the Supreme Court's holding in Harris v. Forklift Systems, 114 S.Ct. 367, 370-71 (1993). That holding, however, merely stated that

Title VII encompasses a broad spectrum of discriminatory conduct. Young does not offer evidence that Bogle failed to follow proper procedures in arriving at her conclusion that Young was "not credible" and that Young resigned on August 24.

Finally, Young contends that the MPSB decision should be set aside because it is arbitrary and capricious based on Bogle failing to "address the uncontradicted evidence of extended leave, or to cite to any evidence whatsoever to support the finding of an August 24, 1993, effective date." The Plaintiff, in making that argument, still avoids the crucial finding of Bogle, namely, that Young resigned on August 24. Contrary to Young's characterization, Bogle's decision clearly cited to several pieces of evidence to support the eventual finding.

The Court does not find that any of the three factors for setting aside the MPSB decision have been sufficiently demonstrated by Young, who bears the burden of establishing one of those factors. The administrative judge clearly took extensive testimony, and her findings and rulings appear to be fully supported by the evidence presented.

In this case, Bogle determined that Young was not credible and that the other witnesses were. The determination of an administrative judge concerning witness credibility is "virtually unreviewable." Henry v. Department of the Navy, 902 F.2d 949, 953 (Fed. Cir. 1990). Accordingly, this Court will not disturb the finding that Young resigned on August

24. In so doing, the Court rejects Young's contention that she was terminated for engaging in protected activity. She had already resigned on August 24 by the time she threatened to file an EEO complaint on August 26. Thus, no "adverse personnel action" occurred. Accordingly, summary judgment is GRANTED as to Count II.

V.

In Count III, Young alleges constructive discharge. Constructive discharge requires proof of a hostile work environment as well as "deliberateness of the employer's actions" and "intolerability of the working conditions." Andrade, 88 F.3d at 262 (quotation omitted). To reiterate, the Court finds that Young's complaint and the evidence does not establish sufficient proof of a hostile work environment. Accordingly, no claim exists. Furthermore, "deliberateness" requires that the employer intended for its actions to be "'an effort to force the employee to quit.'" Id. The Court finds an absence of evidence to support such a standard. According, summary judgment is GRANTED as to Count III.[2]

An appropriate Order shall issue.

/s/ James C. Cacheris
United States District Judge

Alexandria, VA
June 5, 1997

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[2]The Court notes that it considered Count III de novo, and still finds summary judgment appropriate.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Order

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2066

Rose Anne Young,	)	
Plaintiff-Appellant,	)	Order Denying Petition
	)	for Rehearing
v.	)	and Suggestion for
	)	Rehearing In Banc
Togo D. West, Jr.,	)	
Secretary of the Army,	)	
Department of the Army,	)	
Defendant-Appellee.	)	

Filed: July 13, 1998

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

DEPOSITION OF RICHARD E. EDELMAN
MARCH 13, 1997
(PARTIAL)

DEPOSITION OF ROBERT L. NABORS
APRIL 11, 1997
(PARTIAL)

PLAINTIFF'S EXHIBIT 31

DEPOSITION OF LARRY B. SLAGLE
APRIL 15, 1997
(PARTIAL)

DEPOSITION OF CHRISTINA LOVE
APRIL 10, 1997
(PARTIAL)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Rose Anne Young,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-1405-A
	)	
Togo D. West, Jr.,	)	
Secretary of the Army,	)	
Department of the Army,	)	
	)	
Defendant.	)	

DEPOSITION OF RICHARD E. EDELMAN

Page 23, line 20, through page 24, line 14:

Q Okay. So, I guess, the next paragraph says, "1625 hours," and it looks like you had a conversation with Nabors and it looks like you told him, "my opinion was she needed a leave, was under a lot of stress (probably mostly self-induced) and would regret her decision later. He concurred and said if I could turn it around it would meet with his approval."

So, you talked with him about leave?

A I talked with him about trying to discuss the matter with Rose Ann and see if I could get her -- maybe let her go into leave status and take a few days off and reflect and relax and put this thing out of her mind, and get away from the stress environment, and look at it with a fresh view later on.

And it was my impression that I had his concurrence on that.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Rose Anne Young,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-1405-A
	)	
Togo D. West, Jr.,	)	
Secretary of the Army,	)	
Department of the Army,	)	
	)	
Defendant.	)	

DEPOSITION OF ROBERT L. NABORS

Page 69, from the top, to line 4:

Q In you conversation with him at about 1630 on the 17th did you give Richard Edelman authority to put Rose Anne on leave?

A I did not. ....

Page 69, line 15, through page 70, line 2:

Q There is no way he could have left that conversation with the impression that he could fix this by

putting her on vacation?

A He was given authority only to talk to her. That's all. It's very clear.

(Pause.)

Let me tell you exactly rather than trying to infer waht the interpretation is -- Let me read from the document, Exhibit 1-C, which you've given to me.

Page 70, line 13, through page 71, line 7:

Upon my request -- any my being Mr. Edelman -- Colonel Nabors approved my getting involved in attempting to get Ms. Young to stay with the government. I told Colonel Nabors that based on my earlier conversation with her my opinion was she needed to leave, was under a lot of stress, probably multi-self induced and would regret her decision later.

My recollection is we never talked about relief. He concurred and said that if I would turn it around, he would meet with his approval.

He and I never talked specifically about her leave.

He then goes in -- if you'll look --

Q So you disagree with him that he said anything about her needing to leave?

A Yes. ....

DEPARTMENT OF THE ARMY
Office of the Chief of Legislative Liaison
1600 Army Pentagon
Washington, DC 20310-1600

2 FEB 1995

Honorable John Warner
United States Senate
Washington, D.C. 20510

Dear Senator Warner:

This responds to your October 24, 1994, letter regarding Ms. Rose Anne Young and her concerns about Colonel Robert Nabors, her former supervisor and responsible management official in an Equal Employment Opportunity complaint filed by Ms. Young. You inquired about three key issues, which are addressed below:

Issue one: That Ms. Young's complaint, even though filed in August, 1993, is not yet resolved.

Response: The Department of Defense Office of Complaint Investigations (OCI) completed the fact-finding investigation in November, 1994, concluded that management presented legitimate reasons for actions taken, and

recommended a finding of no discrimination or reprisal. As a follow-up appeal, Ms. Young has requested a hearing before an administrative judge. This phase of the EEO complaint process will take several months to resolve.

Issue two: That Colonel Nabors could be promoted without resolution of the complaint.

Response: Colonel Nabors is not due for official promotion until June, 1995. However, because he currently occupies a Brigadier General billet, he is "frocked" to the higher grade. Given the outcome of the OCI inquiry, the Army currently has no reason to delay or otherwise withhold Colonel Nabors' promotion. However, if by June there is any indication that the OCI findings will not be upheld in the final agency review by the Assistant Secretary of the Army (Manpower and Reserve Affairs) (acting through the Equal Employment Opportunity and Complaints Review Agency), Colonel Nabors' promotion may be delayed in accordance with section 624 of Title 10, United States Code (10 U.S.C. 624). Furthermore, if any adverse information arises within eighteen months after Colonel Nabors is promoted, action can be taken by the Secretary of the Army under 10 U.S.C. 625, to vacate the promotion. These provisions of law are adequate to preclude the advancement of an officer determined to be unqualified for appointment to the grade of brigadier general.

Issue three: That Colonel Nabors' status was not "flagged" when the Senate Armed Services Committee (SASC) considered his nomination.

Response: Pre-board investigative checks are conducted by the Army of all officers in the zone of consideration for promotion to brigadier general. The board which recommended Colonel Nabors for promotion convened on June 21, and recessed on June 28, 1994. At that time, preliminary coordination by our General Officer Management Office (GOMO) did not reveal the ongoing EEO inquiry. In accordance with Department of Defense regulations, a post-board adverse information check is also conducted on officers recommended for promotion to General Officer. Information concerning the on-going investigation was provided to the GOMO on July 7, 1994, but presented nothing substantive suggesting the allegations against Colonel Nabors would be upheld. Further inquiry by the GOMO indicated the action concerning Colonel Nabors was not of an unusual nature and was pending further review with no foreseeable completion date. Given this, the GOMO did not provide this potentially adverse information to either the Chief of Staff, Army, or the Secretary of the Army. Thus, the information concerning Colonel Nabors was not forwarded, as it should have been, to the Senate Armed Services Committee (SASC) for their review.

The most significant issue in this case is the Army's failure to advise the SASC of the known information

concerning Colonel Nabors. Those who made the decision not to report the investigation balanced the likelihood that the EEO complaint would be substantiated against the impact on the individual if his promotion was delayed for an open-ended period of time. Although well-intentioned, this decision was wrong. It is clear from correspondence previously received from the SASC and from a review of Department of Defense guidance, that the discretion exercised in this case, however well-meaning, was not authorize

The remaining, compelling question is, "What steps has or the will the Army take to preclude a similar occurrence in the future?"

a. The Army has just reviewed the draft of Department of Defense Instruction 1320.4, (Military Officer Actions Requiring Approval by the President or Secretary of Defense, or Confirmation by the Senate). This revised DoD Instruction contains procedural guidance concerning the processing of adverse information (whether substantiated or alleged) for all military officer nominations. The Army supports the concept of providing the Senate all the information necessary to safeguard the integrity of the selection, nomination, confirmation and appointment processes.

b. The Army regulation which governs promotion of officers on the active duty list does not require revision in order to comply with the new DoD Instruction. However, the Army is currently revising an internal, Headquarters, Department of the Army, regulation ("Policies and Procedures

for Active Component Officer Selection Boards") and will include specific guidance to all members of the headquarters staff involved in the processing of selection board results, regarding the handling of adverse or potentially adverse information pertaining to officers recommended for promotion by a selection board.

c. The files of all officers currently pending promotion to general officer have been reviewed to "double check" our screening process and ensure that there are no other officers situated similarly to Colonel Nabors.

In summary, the OCI report has "cleared" the way for Colonel Nabors promotion, absent the discovery of substantiated adverse information. However, this does not excuse our previous failure to notify you of the information we did have concerning Colonel Nabors, prior to his confirmation.

I sincerely regret that the information concerning the OCI review was not provided to the SASC at the time of Colonel Nabors' nomination. However, we are now taking extraordinary steps to ensure that future nomination lists are subjected to a more strenuous review and that all persons involved with the processing of substantiated or alleged adverse information are aware of their responsibilities in the officer selection, nomination, confirmation and appointment processes.

Sincerely,

/s/ Jerry C. Harrison
JERRY C. HARRISON
Major General, USA
Chief, Legislative Liaison

CF: ASD(FMP)
ASD(LA)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Rose Anne Young,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-1405-A
	)	
Togo D. West, Jr.,	)	
Secretary of the Army,	)	
Department of the Army,	)	
	)	
Defendant.	)	

DEPOSITION OF LARRY B. SLAGLE

Page 28, line 7 to line 18:

Q And you're aware that he talked into taking leave until August 30th?

A That's correct.

Q And you're aware that General Nabors later acquiesced to her being on leave?

A That's correct.

Q And you're aware that Mr. Edelman told CPO

that Ms. Young would be contacting them about the leave?

A I, I wasn't aware that there, there would be any reason for her to contact the, the Civilian Personnel Office about, about the leave.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Rose Anne Young,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 96-1405-A
	)	
Togo D. West, Jr.,	)	
Secretary of the Army,	)	
Department of the Army,	)	
	)	
Defendant.	)	

DEPOSITION OF CHRISTINA LOVE

Page 53, line 14 to line 23:

Q So you have seen the corrected time cards that I have copies of?

A Yes. And those corrected time cards were copies from somebody else. They did not come through civilian pay.

Q And you can tell because they don't have a big stamp on them?

A Yes. There are no holes punched through the copies of the cards and there is no document control number on there.